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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1189

FRANK DELEGGE, SR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 1277

WILLIAM DADDANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 6532

RICHARD CAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 432 F. 2d 1119.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1970. A petition for a rehearing en banc was denied on December 2, 1970. Mr. Justice Marshall extended the time for filing petitions for writs of certiorari in No. 1277 and No. 6532 to January 31, 1971 and the petitions were filed before that date. The petition in No. 1189 was filed on December 31, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were properly joined under Fed. R. Crim. P. 8(b).

2. Whether cross-examination of government witnesses was improperly limited.

3. Whether petitioners' motions for a change of venue and a continuance were properly denied.

4. Whether the trial court took sufficient cautionary measures to insure that the jury did not read or listen to news accounts of the trial.

5. Whether cumulative sentences were properly imposed on petitioner Daddano for the conspiracy and substantive offenses.

STATUTES INVOLVED

18 U.S.C. 3 (Accessory after the fact), provides in pertinent part:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension,

trial or punishment, is an accessory after the fact. * * *

18 U.S.C. 4 (Misprision of felony), provides:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

Federal Rule of Criminal Procedure 8(b) (Joinder of defendants) provides:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT

The evidence is summarized in the opinion of the court of appeals (Pet. App.). The Franklin Park Bank in Illinois was robbed on September 23, 1963. LaJoy, D'Argento, Gerald Tomaszek and Guy Mendola entered the bank while Patrick Schang remained outside in the stolen "getaway" car. Petitioner Frank DeLegge, Sr., had agreed to wait nearby and to crash into any pursuing police car. Frank DeLegge, Jr. was to telephone the police station just before the robbery and report that a bomb had been placed in a school far from the bank. The robbery was timed so that a

freight train would be passing between the bank and the police station, thereby blocking pursuit. These various plans to frustrate police intervention went awry, but the robbers were nevertheless able to elude the police. They drove to a vacant house owned by petitioner DeLegge, Sr., left the money, the stolen car, and materials used in the robbery, and quickly departed. Before the police arrived, found the car and searched the house, the DeLegges had come by and picked up the money and materials. The police subsequently questioned the DeLegges, but apparently concluded at that time that they had had nothing to do with the robbery.

LaJoy, D'Argento, Tomaszek and Schang came under suspicion and were arrested. DeLegge, Sr., took some of the proceeds from the robbery and paid it to Rocco Montagna,[1] a professional bondsman, to arrange for their bonds. The various participants were puzzled that Mendola had not also been indicted, and Schang voiced suspicion that LaJoy had given information to the police. Montagna conveyed these various suspicions to petitioner William Daddano, the "voice of authority in such matters" (Pet. App. 4). Daddano then arranged for the participants to take polygraph examinations to determine who if anyone had given information to the police; that person would be marked for execution.

The tests were administered by William Witsman, a detective in the Special Investigations Unit in the

[1] Montagna also filed a petition for a writ of certiorari, No. 1280, this Term, but dismissed it by stipulation on March 11, 1971.

office of the Sheriff of Cook county. The charts were given to Montagna, who in turn delivered them to petitioner Daddano. Witsman testified that petitioner Cain, his supervisor in the Sheriff's office, had given him a list of questions and had directed him only to administer the tests and not to interpret them. Several months later, Witsman read a news story containing a picture of Schang, whom he recognized as one of the men he had tested; disturbed, he telephoned Cain, who said that he had disposed of the charts. With the exception of Mendola, all participants passed the test; some time later, Mendola was murdered.

LaJoy, Schang, D'Argento and Tomaszek were tried for the bank robbery in 1965 and convicted. These men then decided to cooperate with the government and provided the information which led to the indictment of the DeLegges, Montagna, Daddano and Cain in 1967. Cain, Montagna and Daddano were charged with conspiracy to violate 18 U.S.C. 3 and 18 U.S.C. 4 (Count I), violation of 18 U.S.C. 3 as accessories after the fact (Count III), and misprision of felony in violation of 18 U.S.C. 4 (Count IV). They were convicted on all counts. The DeLegges were charged with bank robbery, under 18 U.S.C. 2113 (a) and (d), and were convicted of the lesser included offense of bank robbery without putting lives into jeopardy. Petitioner Cain was fined $13,000 and sentenced to four years' imprisonment on Counts I and III, and three years on Count IV, the sentences to run concurrently. Petitioner DeLegge, Sr., was

sentenced to fifteen years' imprisonment and fined $5,000. Petitioner Daddano was fined $13,000 and the costs of prosecution; he also was sentenced to five years' imprisonment on Count I, seven years on Count III and three years on Count IV, the sentences to run consecutively for a total of fifteen years.[2]

ARGUMENT

1. The petitioners were properly joined under Fed. R. Crim. P. 8(b). While Cain and Daddano were charged only in accessory roles and the DeLegges were charged only as principals, Rule 8(b) expressly provides that "all of the defendants need not be charged in each count." It does not require all defendants to be charged jointly with at least one of the offenses charged in the indictment, cf. *United States* v. *Hoffa,* 349 F. 2d 20 (C.A. 6), affirmed, 385 U.S. 293. What it requires is that the indictment allege participation in "the same series of acts or transactions." The acts of a principal to a substantive offense and those of an accessory after the fact, *Skelly* v. *United States,* 76 F. 2d 483 (C.A. 10), certiorari denied, 295 U.S. 757, or of one who commits mis-

[2] We are lodging with the Court the Common-Law Record (C.) and portions of the transcript of trial proceedings (R.). Unfortunately, the complete transcript in this case was misplaced in the Court of Appeals and has not yet been located. Through the efforts of the United States Attorney's office most of the volumes of the transcript were obtained. However, volumes IV and V were not secured, and since these volumes contain significant testimony, we are relying upon the United States Attorney's brief in the court of appeals (B.A.), a copy of which has been submitted to this Court, for certain record references.

prision of the felony, are one continuous criminal transaction, and thus do represent "the same series of acts."

None of the cases Petitioner DeLegge cites (No. 1189, Pet. 18–21) conflicts with the holding below. In each, the several accuseds were charged *as principals* in all counts, and it was found that some of the offenses charged were insufficiently interrelated. Since the charges here related to only one principal offense, the bank robbery, a misjoinder of this type was impossible.

All the evidence introduced at the trial would have been proper against each of the defendants had separate trials been granted. Thus, the evidence which bore upon DeLegge's participation in the bank robbery was admissible against Cain and Daddano to show elements of the offenses with which they were charged. In order to obtain a conviction under 18 U.S.C. 4, the government must prove beyond a reasonable doubt that one or more of the principals committed an offense. *Neal* v. *United States,* 102 F. 2d 643 (C.A. 8). And in the trial of one as an accessory after the fact (18 U.S.C. 3), any evidence admissible to prove the principal crime is admissible against the accessory. *Barone* v. *United States,* 205 F. 2d 909 (C.A. 8).[3] Conversely, the evidence regarding the polygraph test was admissible against petitioner DeLegge, Sr., who actually participated in that scheme

[3] The court in *Barone* stated that merely introducing evidence of the principal's conviction would be insufficient as it would violate the defendant's right of confrontation.

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(R. 420). His participation in willful concealment of the commission of the crime could be considered circumstantially relevant to prove the commission of the principal offense. *Ashcraft* v. *Tennessee,* 327 U.S. 274; *Bird* v. *United States,* 187 U.S. 118; *Allen* v. *United States,* 164 U.S. 492, *Rivers* v. *United States,* 270 F. 2d 435 (C.A. 9). The subsequent acts need not be elements of the offense charged. *Cummings* v. *United States,* 398 F. 2d 377 (C.A. 8).

2. Petitioners contend that cross-examination of government witnesses was so circumscribed as to violate the holdings of this Court in *Alford* v. *United States,* 282 U.S. 687, *Smith* v. *Illinois,* 390 U.S. 129, *Garafolo* v. *United States,* 390 U.S. 144 and *Shaw* v. *Illinois,* 394 U.S. 214. The record shows, to the contrary, that a wide latitude of cross-examination was permitted and that circumstances bearing upon the credibility of the witnesses were fully disclosed.

For the most part, the specific examples of restricted cross-examination alleged by petitioners are misleading. Petitioner Daddano notes, for example, that the witness LaJoy was asked whether he was involved in a jury bribery case and that a government objection to the question was sustained. However, there was cross-examination on this subject and LaJoy testified that he told a United States Attorney that he participated in a scheme to bribe a juror (R. 647). Contrary to petitioner's suggestion that no cross-examination was permitted about LaJoy's subornation of perjury in his bank robbery trial, LaJoy testified that, even though he had participated in the robbery,

he had obtained alibi witnesses on his behalf and had lied to arresting agents in order to set up his alibi (R. 514, 636–637). Other testimony elicited from this witness established that he had hopes of a reduction in his present sentence and that his wife and children had received a large sum of money from the government in exchange for his testimony (R. 475–485, 578, 652–654). He admitted that he had lied under oath in his own trial for this robbery (R. 457–458), and that aside from his prior convictions, he had participated in numerous other crimes (R. 639–647, 711).

Similarly, Schang testified that he had participated in the robbery and yet had called an Illinois policeman as an alibi witness (R. 1413–1415). Contrary to the suggestion that no cross-examination as to his present employment was permitted, he testified that he had been a corporate salesman for the past fourteen months (R. 1416, 1520). During his cross-examination, it was established that he had received a sentence of fifteen years for the Franklin Park robbery, but had served only four months in jail and had hopes that he would not have to serve any additional time (R. 1322, 1430, 1440, 1463, 1491). Schang admitted that he had pleaded guilty to thefts of interstate shipments (involving kidnaping) for which he had not yet been sentenced (R. 1402, 1426, 1486); that he was presently free on bond (R. 1322, B.A. 54); that he was presently under indictment in another case (R. 1527, B.A. 54) which he had discussed with the United States Attorney's office and the FBI (R. 1500–1503, 1531–1536, 1545).

Although it is contended that the court limited cross-examination of the witness D'Argento about a letter complaining of harassment by the government while he was in jail, D'Argento testified on cross-examination that he had signed his name to the letter, written by another, as part of a scheme to get out of jail (R. 982–997, 1144–1151, B.A. 53, 69). Cross-examination of this witness also established that since the age of twenty-two he had made his living by stealing (R. 1134, B.A. 53); that he had been convicted of ten felonies (R. 897–898, 913–917, B.A. 52); that he was presently in jail serving concurrent terms of fifteen to twenty years' imprisonment (R. 902, 1122, B.A. 52); that he had testified falsely in another trial for the witness LaJoy (R. 1085–1086, B.A. 53); that he hoped for consideration by any sentencing judge (R. 1057–1058, B.A. 53); that he had been arrested by petitioner Cain for the murder of Guy Mendola (R. 947–968, B.A. 53); and that he and his family had received a large sum of money from the government (R. 1051–1056, B.A. 53).

In light of the impeachment material thus exposed, and the testimony that the lie detector tests had been given to identify informers for subsequent execution (R. 414, 856, 1356, 1363, B.A. 11–13), the trial judge reasonably sustained objections to the effort to discover Schang's present address. *United States* v. *Varelli,* 407 F. 2d 735 (C.A. 7). The fact that Witsman gave his address does not show that concealment was unnecessary as to Schang. Witsman was a functionary who merely carried out the orders of his police su-

pervisor; Schang was a participant who had become a government witness.[4]

3. The contention of petitioner DeLegge (No. 1189) that the trial court erred in refusing to grant motions for a change of venue and a continuance because of pretrial publicity is fully answered by reference to the ten newspaper articles offered in support of this proposition. Four of those articles, appearing approximately five years prior to trial, merely referred to arrests made in connection with the Franklin Park bank robbery and in no way implicated any of the petitioners (C. 256–259). The remaining articles appeared approximately five months prior to trial. Five of these concerned the upcoming gubernatorial election and contained brief incidental references to petitioner Cain (R. 159, 160a, 161, 162, 163). The remaining article referred to Cain in a context unrelated to the subject matter of the trial and was in no way derogatory (R. 160b). Any possibility of prejudice from this publicity was removed by the *voir dire* examination of prospective jurors, which resulted in the removal of the one juror who indicated prejudice as a result of exposure to pre-trial publicity (R. 82–86).

4. The trial court did not depart from the principles of this Court's decisions in refusing to poll the jury to determine whether or not they had come in

[4] Even though the witness LaJoy was incarcerated at the time and so testified, petitioner Daddano asked such questions as to his present address, how long he had lived there and with whom he was living (R. 602–605). No prejudice ensued from sustaining objections to these questions, since LaJoy's criminal activities and reasons for seeking official favor were amply shown.

contact with news items published during trial.[5] At the beginning of the trial, and each time they separated, the trial judge explicitly ordered the jurors not to read newspapers or listen to radio and television; they were also warned to avoid inadvertent exposure to any outside discussions or comments concerning the case; and to report any such exposure to him as soon as possible if it occurred (R. 39–42, 170, 253, 360, 421, 529, 615, 656, 750, 760–761, 869, 957–

[5] The publicity surrounding this trial consisted of newspaper accounts which for the most part contained condensed reports of trial events. That publicity which could be characterized as prejudicial consisted of articles about the trial containing references to petitioners as "syndicate hoodlums" and similar descriptions (*e.g.*, C. 659, 662, 663, 677, 684, 688, 701); references to the murder of Guy Mendola with the suggestion that he "probably" or "allegedly" was slain by "other gang members" because he failed the lie detector test (*e.g.*, C. 658, 661, 663, 678, 705); and references to the contents of a psychiatric report of the witness D'Argento disclosed out of the presence of the jury (*e.g.*, C. 702, 704, 706).

Considering the nature of the evidence at the trial itself, the newspaper characterizations and the references to Mendola's murder added little. Defense counsel brought D'Argento's psychiatric report into the record by cross-examination in which D'Argento responded that he had decided to cooperate with the government because "people associated" with the petitioners had tried to kill him in prison. (R. 1011–1012, B.A. 41). A motion for a mistrial was made, and the United States Attorney sought to show that counsel could have anticipated this response by reference to the psychiatric report, a copy of which had been provided the defense. The report related D'Argento's fear that "the organization of Chicago [had] passed a death sentence on him" (*e.g.*, C. 702). The trial court denied the motion for a mistrial, and instructed the jury to disregard the answer (R. 1016–1018, B.A. 42). The newspaper report of D'Argento's fear of death at the hands of petitioners' associates could add little to the stricken answer the jury heard.

958, 1012–1041, 1059 1160, 1217–1218, 1268–1269, 1304–1305, 1371, 1507, 1595, 1601, 1740–1741, 1776–1777, 1903, 1921, 1965, 2022, 2064, B.A. 37). Thus, the trial judge stopped just short of sequestration in his effort to impress upon the jurors their duty to refrain from exposure to publicity. It would be improper to assume that the jury neglected to follow such emphatic and repeated instructions. *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U.S. 474, *Estes* v. *United States,* 335 F. 2d 609 (C.A. 5), certiorari denied, 379 U.S. 964. Confronting the jurors daily with questions whether they had seen particular articles was not only unwarranted in these circumstances, but might have drawn their attention to the allegedly prejudicial matter.

Petitioners rely primarily upon other Seventh Circuit cases as support for their proposition that the judge should have polled the jury about any exposure to publicity. *United States* v. *Accardo,* 298 F. 2d 133; *United States* v. *Palermo,* 410 F. 2d 468. It was critical to *Accardo,* however, that the trial judge had failed to admonish the jury during trial to refrain from contact with news stories. And *Palermo* was decided five months after the trial of this case. While the Seventh Circuit did hold, in the somewhat different circumstances of that case, that a jury should be polled when the possibility of exposure to prejudicial publicity arises, a modification of that opinion by the same court in this case presents no basis for review here. On its own facts, there is nothing in this case to suggest that petitioners did not have a fair trial.

5. Petitioner Daddano (No. 1277) contends that the consecutive sentences imposed on the three counts of which he was convicted are improper. It is, however, well settled that both substantive offenses and a conspiracy offense involve discrete elements and may be punished by cumulative sentences. *Callanan* v. *United States,* 364 U.S. 587; *Pereira* v. *United States,* 347 U.S. 1, *United States* v. *Krol,* 374 F. 2d 776 (C.A. 7), certiorari denied, 389 U.S. 835.

The offense described by 18 U.S.C. 3 (accessory after the fact) is distinct from the conduct contemplated by 18 U.S.C. 4 (misprision of felony). The former is aimed at those who in some manner assist a felon in order to hinder the latter's apprehension, trial or punishment; the focus is upon aiding the felon for this purpose, *Skelly* v. *United States,* 76 F. 2d 483 (C.A. 10), certiorari denied, 295 U.S. 757. Misprision of felony, on the other hand, is directed at those who, knowing of the commission of a felony, fail to disclose this information to the authorities as soon as possible and then go on in some manner to conceal commission of that felony, as by suppression of evidence. As the court of appeals noted, 18 U.S.C. 4 does not require an intent to benefit the principal offender. Under that statute, the purpose of the concealment is unimportant, whereas for prosecution as an accessory after the fact, the purpose must be to assist the felon. Moreover, an element essential to a showing of violation of 18 U.S.C. 4 is failure to disclose information of commission of a felony to the authorities as soon as possible, an element not at all required by 18 U.S.C. 3. Since the offenses contemplated by the two statutes involve

discrete elements, the trial court cannot be said to have abused its discretion in imposing consecutive sentences, *Blockburger* v. *United States,* 284 U.S. 299.

Petitioner also relies upon prior decisions of this Court applying a "policy of lenity" where the legislative intent is unclear as to whether or not the imposition of cumulative penalties is the desired result. *E.g., Ladner* v. *United States,* 358 U.S. 169; *Gore* v. *United States,* 357 U.S. 386. In such cases, however, the critical determination is an analysis of a single statute to discover whether or not Congress intended separate offenses arising from violation of that statute to be punished consecutively. Such cases are not applicable to a situation like petitioner's, in which consecutive sentences are imposed for violation of two separate and clearly distinct statutes. The legislative intent here is to be derived not from an examination of the history of the statute, but from the fact that separate statutes contemplating different kinds of conduct were enacted.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari be denied.

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